

STATE OF MICHIGAN  
COURT OF APPEALS

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EXCEL INDUSTRIAL ELECTRONICS,

Plaintiff-Appellant,

V

DEBRA BLANCO,

Defendant-Appellee.

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UNPUBLISHED

January 3, 2003

No. 228859

Macomb Circuit Court

LC No. 94-005870-CK

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of judgment for defendant. We affirm.

Plaintiff filed a complaint alleging various claims, including breach of fiduciary duty, fraud, tortious interference with advantageous business transactions, misappropriation of trade secrets, and business defamation, against defendant, its former employee. Defendant filed a counterclaim against plaintiff, denying plaintiff's claims and asserting that she was owed unpaid commissions earned prior to her termination from plaintiff's employment totaling over \$3,500. Defendant also sought treble damages, reasonable attorney fees, and court costs.

The case proceeded to a jury trial and at the close of plaintiff's proofs, the trial court granted defendant's motion for a directed verdict on plaintiff's complaint. Defendant's counterclaim proceeded to the jury, and the jury returned a verdict in favor of defendant in the amount of \$3,574.11. The jury specifically found that plaintiff's failure to pay defendant the outstanding commissions was intentional. Plaintiff appealed both the trial court's order granting directed verdict to defendant on plaintiff's claim and the jury verdict in favor of defendant on her counterclaim.

Defendant filed a motion in the trial court seeking attorney fees, costs, and mediation sanctions pursuant to MCR 2.403(O). Both parties stipulated to stay the proceedings in the trial court pending plaintiff's appeal. Thereafter, this Court issued a per curiam opinion affirming both the trial court's grant of defendant's motion for directed verdict on plaintiff's complaint, and the jury's verdict awarding defendant \$3,574.11 in unpaid commissions. *Excel Industrial Electronics, Inc v Debra Blanco*, unpublished per curiam opinion of the Court of Appeals, issued June 30, 1998 (Docket No. 196899). The trial court then granted defendant's motion for treble damages and granted attorney fees and reasonable costs subject to "the scheduling of an evidentiary hearing to determine an appropriate award." Both parties agreed to a quasi bench

trial arbitration on the issue of attorney fees and costs, conducted by a panel consisting of the trial court sitting as an arbitrator and two additional arbitrators not objected to by the parties.

At the conclusion of the arbitration proceeding, the panel unanimously concluded that as the prevailing party on plaintiff's complaint, defendant should be awarded attorney fees for 450 hours of legal services at \$100 an hour, totaling \$45,000. The panel also determined a reasonable attorney fee on the counterclaim in the amount of \$3,000. Finally, the panel awarded costs to defendant in the amount of \$5,577.55. An arbitration award totaling \$53,577.55 was issued by the trial court in its capacity as an arbitrator, and subsequently, the trial court issued an order of judgment consistent with the arbitration findings totaling \$53,577.55. This appeal followed.

On appeal, plaintiff first claims that the trial court abused its discretion when it granted treble damages to plaintiff. Plaintiff asserts this award was precluded by the application of res judicata and collateral estoppel. We disagree. The applicability of res judicata is a question of law that is reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). Additionally, the applicability of collateral estoppel is a question of law subject to de novo review by this Court. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. It only applies when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained. *Ditmore v Michalik*, 244 Mich App 569, 578; 625 NW2d 462 (2001). For collateral estoppel to apply, the ultimate issue to be concluded in the second action must be the same as that involved in the first action. *Eaton Co Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). The issues must be identical, and must have been both actually and necessarily litigated. *Id.* at 376-377. "To be necessarily determined . . . , the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel. *Id.* at 377.

Here, collateral estoppel does not apply because the treble damages award was not issued in a subsequent or second proceeding. While plaintiff's appeal of the jury verdict and directed verdict was pending in this court, the trial court stayed proceedings. No determination of damages was made by the trial court until after this Court had issued its opinion on the liability verdicts. Therefore, damages and liability were determined in the same proceeding, and collateral estoppel cannot preclude this determination. *Ditmore, supra* at 578.

Res judicata prohibits a subsequent action between the same parties when the facts or evidence essential to the action are the same as those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata requires that: the prior action was decided on the merits; the decree in the prior action was a final decision; the matter contested in the second case was or could have been resolved in the first; and both actions involved the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). Res judicata does not apply within a single action. *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). As we discussed above, the liability and damages determinations at issue were made in the same cause of action. Because this is a single action,

we find that res judicata does not apply on these facts. *Baraga Co, supra* at 269; *Harvey, supra* at 437.

Plaintiff next argues that the trial court erred when it authorized and conducted a hearing on the question of mediation sanctions. Plaintiff claims the request for mediation sanctions was untimely made and thus waived. A trial court's decision whether to grant mediation sanctions is reviewed de novo on appeal. *Braun v York Properties, Inc*, 230 Mich App 138, 149; 583 NW2d 503 (1998). The decision to award attorney fees is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). An abuse of discretion occurs when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

"A request for costs under [MCR 2.403(O)(8)] must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment." MCR 2.403(O)(8); *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 616; 643 NW2d 600 (2002). The "judgment" is "the judgment adjudicating the rights and liabilities of particular parties, regardless of whether that judgment is the final judgment from which the parties may appeal." *Braun, supra* at 150, citing MCR 2.604(A).

Here, after plaintiff rejected mediation awards, the case went to trial on May 6, 1996. On July 8, 1996, the lower court entered an order of judgment reflecting the jury's verdict on defendant's counterclaim, specifically including that plaintiff's failure to pay defendant the outstanding commissions was intentional. Defendant filed a motion for attorney fees, costs, and mediation sanctions on August 2, 1996. The July 8, 1996 judgment adjudicated the rights and liabilities of the particular parties. *Braun, supra* at 150. As such, because defendant filed her motion for attorney fees and costs on August 2, 1996, it was filed twenty-five days from the date the court entered the judgment, and thus, defendant's motion was timely filed within the applicable twenty-eight day requirement of MCR 2.403(O)(8). *O'Neill, supra* at 616. Hence, we find that the trial court did not err when it authorized an arbitration hearing on the issues of attorney fees and costs.

Lastly, plaintiff argues that the award of \$53,777 in attorney fees and costs was not reasonable. This Court reviews the findings of fact underlying an award of attorney fees for clear error. *Solution Source, Inc v LPR Associates Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002). However, the decision to award attorney fees, as well as the determination of the reasonableness of the fees, are within the trial court's discretion. Accordingly, they are reviewed on appeal for an abuse of discretion. *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 61; 604 NW2d 745 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Solution Source, supra* at 381-382.

When the reasonableness of a fee request is challenged, the trial court must generally conduct an evidentiary hearing. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). Here, at the direction of the trial court, an arbitration panel conducted an evidentiary hearing on the reasonableness of the fees and costs. The panel took testimony from defense counsel, where he was extensively cross-examined by plaintiff's counsel

regarding his background, experience, customary rates charged, amount of time spent on tasks, and specific line items from the itemized charges he provided. The arbitration panel read its findings and determinations into the record. The panel stated:

[T]he record should reflect that we also found that in arriving at attorney fees we assessed the quality of the work, the experience of the attorney and the agreement he had with his own client to be paid \$100 per hour. And in looking at the work, and the agreement for fees, we felt that those two were married together sufficiently and appropriately so that would be the appropriate fee for services rendered. The record should further reflect that we found as it related to the disallowed hours excessive duplication, and to charge those hours for excessive duplication would be an unfair sanction.

There is no precise formula for assessing the reasonableness of an attorney fee, but factors which should be considered include: (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitations imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. *Head, supra* at 114; *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 341-342; 530 NW2d 183 (1995).

The arbitration panel was in the position to judge the skill, time, and labor involved in the case, as well as the difficulty level of the case. The panel heard defense counsel's testimony at the hearing, where defense counsel was both directly and cross-examined. As such, the panel considered extensive and detailed testimony regarding defense counsel's background, experience, customary rates charged, amount of time spent on tasks, and specific line items from the itemized charges he provided. The panel also considered the evidence before it, including the itemized lists documenting the time claimed by defense counsel as well as the costs incurred. Although findings regarding each factor in the *Head, supra* analysis need not be detailed, the panel stated on the record exactly what it factors it considered important and its reasoning behind the monetary amount awarded to defendant. *Michigan National Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Under the circumstances of this case, we find the record was sufficient for the determination of the reasonableness of attorney fees awarded, and therefore, the trial court did not abuse its discretion in its award of attorney fees to defendant. *Bolt, supra* at 61; *Head, supra* at 113.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder